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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 812

THE CITY OF NEW ORLEANS,
Appellant,

versus.

EARL BENJAMIN BUSH, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana by the City of New Orleans.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

THE CITY OF NEW ORLEANS,
Appellant,

versus

EARL BENJAMIN BUSH, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana by the City of New Orleans.

STATEMENT AS TO JURISDICTION.

Appellant, the City of New Orleans, appeals from a judgment of the United States District Court for the Eastern District of Louisiana, entered on December 21, 1960, declaring unconstitutional Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1960 and House Concurrent Resolution Numbers 2, 23 and 28 of the Second Extraordinary Session of the Louisiana Legislature for 1960, and enjoining the City

of New Orleans and other officers of the State of Louisiana, and all persons who are acting or may act in concert with them, from enforcing said act and resolutions and further enjoining the City of New Orleans, its officers, agents, and employees, from failing or refusing to pay the Orleans Parish School Board daily all taxes levied by the Orleans Parish School Board and collected by the City of New Orleans. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Louisiana issued on December 21st, 1960, and the judgment and temporary injunction issued the same date, December 21st, 1960. This opinion and temporary injunction are unreported. A copy of the opinion and temporary injunction complained of are attached hereto in Appendix "A".

JURISDICTION.

The immediate phase of the litigation involved in this appeal, is as to the judgment of the United States District Court for the Eastern District of Louisiana, specially constituted under 28 U.S.C. Sec. 2281 and 28 U.S.C. Sec. 2284, upon the application by the Orleans Parish School Board under a cross claim and Third-Party complaint seeking an interlocutory and permanent injunction to have declared unconstitutional Act 2 and

House Concurrent Resolutions 2, 23 and 28 of the Second Extraordinary Session of 1960 and to restrain the City of New Orleans from failing to pay to the Orleans Parish School Board, daily, all taxes levied by the Orleans Parish School Board and collected by the City of New Orleans, as being repugnant to the due process and equal protection of the Laws Clauses of the Fourteenth Amendment of the United States Constitution.

The decree appealed from was made and entered on December 21st, 1960. Notice of Appeal was filed in the United States District Court for the Eastern District of Louisiana on January 16, 1961.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C., § 1253 and 2101 (b).

The following decisions are submitted as sustaining the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Insurance Company vs. Conn, 47 S. Ct. 88, 272 U. S. 295,71 L. ed 243; St. John vs. Wisconsin Employment Relations Board, 71 S. Ct. 375, 340 U. S. 411, 95 L. Ed. 386.*

QUESTIONS PRESENTED.

The principal question presented is of course the validity of the Act and the several resolutions nullified

by the District Court. Interwoven in their determination, however, is the question of the necessity, indeed, the propriety of the District Court's injunctive order.

STATUTES INVOLVED.

The Act and Resolutions under attack in this proceeding are set forth in Appendix "B" of the Louisiana Legislature's Jurisdictional Statement and are made part hereof by reference.

STATEMENT OF THE CASE.

The history of this litigation is set out in detail, also, in the opinion by the District Court handed down December 21, 1960 (See Appendix A) and will not be repeated here. By Act 17 of the First Extraordinary Session of 1960, the Legislature withdrew and reserved to itself all administrative authority formerly exercised by the Orleans Parish School Board, the original defendant in this matter. Act 2 of the Second Extraordinary Session of 1960 re-established the School Board with new personnel for the purpose of handling fiscal matters only. The old School Board filed a third party complaint naming, among other defendants, the City of New Orleans, which complaint sought to prevent any recognition of the newly constituted School Board. Specifically the third party complainant asks that the City of New Orleans, as the tax collector for the Board, be directed by injunction to remit to the old Board, the taxes collected on its behalf. The in-

junction so issued from which the City has filed this appeal.

THE QUESTIONS ARE SUBSTANTIAL.

That Act 2 is constitutional on its face cannot be questioned. It was upheld by the Louisiana Supreme Court on December 15, 1960, in *Singleman vs. Davis*, ..., *La.* ....., *125 So. 24, 414*. The principle reasons for that conclusion follow:

"The actions of the United States District Court took place before the persons appointed or to be appointed by the Governor as Members of the Orleans Parish School Board had begun to function or perform any acts and without any evidence having been adduced that they would act unconstitutionally or in violation of any orders or decrees of the United States District Court. Under these circumstances, if Act No. 25 is constitutional on its face, as it is, and is a measure adopted, as stated by the United States District Court, "in an area peculiarly reserved for exclusive state action," how does the mere statement that is was "part and parcel of the original 'segregation package'" justify in law a holding of unconstitutionality? Such a holding is based on an assumption that a school board not yet provided for or even in existence will act or perform its duties in an unconstitutional way. This is not a basis in law for declaring an act unconstitutional."

"With reference to Act No. 2, creating a school board for Orleans Parish with limited powers financial in nature, it is clear that it was adopted by the Legislature for the purpose of bringing financial order where financial chaos exists. Its primary purpose was to create a school board with power and authority to discharge from public funds large financial obligations incurred in the operations of the Orleans Parish public schools, no such power and authority being in existence at the time the act was adopted."

"The first point to be decided in this Court is that of the right of the Legislature to create parish school boards and the right to abolish boards so created; and the second point for decision is that of the right of the Legislature to create a new school board in the place of an abolished board and provide for the appointment of board members during the interim between the effective date of Act No. 2 of the Second Extraordinary Session and the date of the regular congressional elections."

"Act No. 2 under consideration herein and Act No. 25 of the First Extraordinary Session are authorized by Section 10 of Article XII of the Constitution of Louisiana of 1921, which provides:

> "The Legislature shall provide for the creation and election of parish school boards which shall elect parish superintendents for their respective parishes, and such other officers or agents as may be authorized by the Legislature. * * *"

"In the case of *State ex rel. Board of Directors of Public Schools v. City of New Orleans*, 1890, 42 La.Ann. 92, 7 So. 674, 676, this Court, in no uncertain terms held that the system of free public schools in Louisiana is a State institution, for the establishment, maintenance and support of which the State is required to provide by taxation, or otherwise.[4]

"This authority also sets forth:

> "It is elementary that a state, in the absence of constitutional prohibition, may delegate part of her political and administrative powers to (governmental subdivisions) within her borders, which then become state functionaries; and that, whenever such delegation may take place, the state can confer on them certain rights, which she may subsequently extend, abridge *or withdraw*, as may seem just and advisable [but without impairing the obligation of contracts].
>
> "This principle of delegation is essential in the very nature of things, as otherwise the local administration necessary for public good would be an impossibility, in consequence of the practical inability of the state general government to well provide, by itself, for the regulation of administrative matters on numerous important details in the different parts of the state." (Emphasis ours.)

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[4] See, also, Bank of Winnfield v. Brumfield et al., 11 La.App. 647, 124 So. 628, State ex rel. Wimberly v. Barham, 173 La. 488, 137 So. 862, 861; State ex rel. White v. Mason, 17 La.App. 504, 133 So. 808, 811.

"In the early case of *Newton v. Mahoning County Commissioners*, 100 U.S. 548, 25 L.Ed. 710, the United States Supreme Court stated:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation."

"See *Higginbotham v. City of Baton Rouge, Louisiana*, 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968, and authorities cited therein, wherein the foregoing principle was affirmed. See, also, 172 A.L.R. 1380; *State ex rel. Porterie v. Smith*, 184 La. 263, 166 So. 72.

"[3] We conclude that Acts Nos. 2 and 25, *supra*, are valid and constitutional enactments on their face. The Legislature cannot be enjoined from enacting valid legislation; actions under the law can be enjoined only if unconstitutionally administered, applied, and construed."

"[4] Where an act is constitutional on its face, *courts cannot assume that it will be given an unconstitutional application or construction or be administered unconstitutionally*. Any other interpretation would allow the school board which was functioning under the act by which such school board was abolished to remain in office indefinitely; perhaps beyond the terms

for which the respective members were elected. The officers appointed or to be appointed under the authority of Act. No. 2 of the Second Extraordinary Session will be amenable not only to the process of this Court but to that of any other Court having jurisdiction if they act unlawfully or unconstitutionally."

As was conceded in the District Court's written reasons of November 30 and December 21, 1960, this is a matter ordinarily of strictly local concern. But, concluded the Court, since the Louisiana Legislature's "motive" in enacting Act 2 was simply to frustrate the order of the Court, the Act is unconstitutional.

As a primary proposition, the District Court erred in measuring Act 2's validity in terms of intent or motive. It is fundamental that constitutional validity of Legislative Acts must be tested objectively, on the merits of the Legislation itself, without regard to the evil or good intent of those enacting it. *Barenblath vs. U. S., 360 U. S. 109, 132, 3 L. ed. 2d 1115; Arizona vs. California, 283 U. S. 423, 455, 75 L. ed. 1154* and cases cited therein. In this matter, without proof, the District Court assumed that the new Board would frustrate the orders of the Court. In the words of the December 21st opinion:

> "However local in character Act 2 and Resolutions 2, 23, and 28 may appear, since they would discriminate against Negro children through interference with the orders of this Court, they are invalid."

An essential element of the Court's conclusion then is the statement that the new members of the Board

would interfere with the orders of the Court. But it should not, and cannot, make any difference whatever what particular individuals hold positions on the School Board, since no matter who they might be, they are nevertheless subject to the process of the District Court. In fact, the original injunction issued in this matter enjoined the School Board "its agents, its servants, its employees, *their successors in office*, and those in concert with them who shall receive notice of this order". Since the newly appointed school board is apparently subject to their injunctive powers what necessity was there to prohibit the new board from taking office? To continue the old school board in office is in effect, to deny to Louisiana the obvious right to appoint and remove its local officials.

There has been little doubt, since *Marbury vs. Madison, 1 Cranch 137*, that "it is emphatically the province and duty of the judicial department to say what the law is". However, if the judiciary was to have the last word what was to become of our precious system of checks and balances. There could be only one answer and that was self imposed judicial restraint.

If these new school board members are subject to the orders of the District Court, as were their predecessors, wherein is the justification for denying them recognition; wherein is the necessity for denying the State of Louisiana the right to name and replace its local officials?

It is submitted that the District Court was in error in nullifying the Act 2, creating the new School Board,

and House Concurrent Resolutions 2, 23 and 28 and that it erred in concluding that these new members would or could frustrate the orders of the Court.

Respectfully submitted,

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CERTIFICATE.

I, Alvin J. Liska, City Attorney for the City of New Orleans and a member of the Supreme Court of the United States, do hereby certify that on the 14TH day of MARCH, 1961, I served copies hereof, on all parties in this cause, by mailing a copy in a duly addressed envelope, with postage paid, to counsel of record for said parties.

This 14th day of March, 1961.

.....

APPENDIX "A".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 3630—CIVIL ACTION.

EARL BENJAMIN BUSH, ET AL.,
Plaintiffs,

versus

ORLEANS PARISH SCHOOL BOARD, ET AL.,
Defendants.

TEMPORARY INJUNCTION.

These cases came on for hearing on motions of Earl Benjamin Bush, et al, and the United States, *amicus curiae*, for temporary injunction, restraining the enforcement of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for the year 1960, and on motion of the Orleans Parish School Board for temporary injunction restraining the enforcement of House Concurrent Resolutions 2, 23 and 28 of the Second Extraordinary Session of the Louisiana Legislature for 1960 and restraining certain banks and the City of New Orleans from withholding funds belonging to the Board.

It being the opinion of this Court that all Louisiana statutes which would directly or indirectly require seg-

regation of the races in the public schools, or deny them public funds because they are desegregated or interfere with the operation of such schools, pursuant to the orders of this court, by the Orleans Parish School Board, are unconstitutional, in particular, Act 2 and House Concurrent Resolutions 2, 23 and 28;

IT IS ORDERED that the Honorable Jimmie H. Davis, Governor of Louisiana, the Honorable Clarence C. Aycock, Lieutenant Governor of Louisiana, the Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, the Legislature of the State of Louisiana, and the individual members thereof, Shelby M. Jackson, State Superintendent of Education, the Orleans Parish School Board, Lloyd J. Rittiner, Louis C. Riecke, Matthew R. Sutherland, Theodore H. Shephard, Jr. and Emile A. Wagner, Jr., the members thereof, James F. Redmond, Superintendent of Schools for the Orleans Parish School Board, A. P. Tugwell, Treasurer of the State of Louisiana, Roy R. Theriot, State Comptroller, the Louisiana State Board of Education and the individual members thereof, Paul B. Habans, Gerald J. Gallinghouse, David B. Gertler, Edward F. LeBreton, Charles Deichmann, Ridgley C. Triche, P. P. Branton, Welborn Jack, Vial Deloney, William Cleveland, E. W. Gravolet, the City of New Orleans, the Whitney National Bank of New Orleans, the Hibernia National Bank in New Orleans, the National American Bank of New Orleans, the National Bank of Commerce in New Orleans, and all other persons who are acting or may act in concert with them, be, and they are hereby, re-

strained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act 2 and House Concurrent Resolutions 2, 23 and 28 of the Second Extraordinary Session of the Louisiana Legislature for 1960, and from otherwise interfering in any way with the operation of the public schools for the Parish of Orleans by the Orleans Parish School Board, pursuant to the orders of this Court.

IT IS FURTHER ORDERED that the Whitney National Bank of New Orleans, the Hibernia National Bank in New Orleans, the National American Bank of New Orleans, and the National Bank of Commerce in New Orleans, their officers, agents and employees, and all persons acting in concert with them, be, and they are hereby restrained, enjoined and prohibited from failing or refusing to honor any checks drawn on them by the Orleans Parish School Board which are regular on their face, so long as the said Board has sufficient funds on deposit to cover said checks.

IT IS FURTHER ORDERED that the City of New Orleans, its officers, agents and employees, and all persons acting in concert with them, be, and they are hereby, restrained, enjoined and prohibited from failing or refusing to pay to the Orleans Parish School Board daily all taxes levied by the Orleans Parish School Board and collected by the City of New Orleans.

IT IS FURTHER ORDERED that copies of this temporary injunction shall be served forthwith upon each of the defendants named herein.

IT IS FURTHER ORDERED that copies of this temporary injunction shall be served forthwith on the Louisiana Sovereignty Commission, through its chairman, and on the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, through its chairman.

Inasmuch as this temporary injunction is issued on the motions of the United States and of the Orleans Parish School Board, no bond is required. 28 U.S.C. § 2408; La. R.S. 13:4581.

(S.) RICHARD T. RIVES,
(Richard T. Rives),
Judge, United States Court of Appeals,

(S.) HERBERT W. CHRISTENBERRY,
(Herbert W. Christenberry),
Chief Judge, United States District Court,

(S.) J. SKELLY WRIGHT,
(J. Skelly Wright),
Judge, United States District Court.

Issued December 21st, 1960,
at New Orleans, Louisiana.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 3630—CIVIL ACTION.

EARL BENJAMIN BUSH, ET AL.,
Plaintiffs,

versus

ORLEANS PARISH SCHOOL BOARD, ET AL.,
Defendants.

RIVES, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges.

In these proceedings, we consider again[1] the progress of desegregation in the public schools of the Parish of

[1] The Orleans Parish school desegregation controversy has been in the federal courts for eight years.
In 1954, the state adopted a constitutional amendment and two segregation statutes. The amendment and Act 555 purported to re-establish the existing state law requiring segregated schools. Act 556 provided for assignment of pupils by the school superintendent. On February 15, 1956, this court held that both the amendment and the two statutes were invalid. The court issued a decree enjoining the School Board, "its agents, its servants, its employees; their successors in office and those in concert with them who shall receive notice of this order" from requiring and permitting segregation in the New Orleans schools. *Bush v. Orleans Parish School Board*, 138 F.Supp. 336, 337, aff'd, 242 F.2d 156, cert. denied, 354 U.S. 921.
Not only was there no compliance with that order, but immediately thereafter the Legislature produced a new package of laws, in particular Act 319 (1956) which purported to "freeze" the existing racial status of public schools in Orleans Parish and to reserve to the Legislature the power of racial reclassification of schools. On July 1, 1956, this court refused to accept the School Board's contention that Act 319 had relieved the Board of its responsibility to obey the de-

Orleans and the additional efforts made to interfere with that achievement. Because of what has been said and done by the Government of Louisiana in all its branches, it becomes necessary to restate the fundamental principles, that govern this controversy. Under the circumstances, they cannot be declared too often or too emphatically. These principles are:

1. That equality of opportunity to education through access to non-segregated public schools is a right secured by the Constitution of the United States to all citizens regardless of race or color against State interference. *Brown v. Board of Education*, 347 U.S. 483.

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segregation order. In the words of the court, "Any legal artifice, however cleverly contrived, which would circumvent this ruling [of the Supreme Court, in *Brown v. Board of Education*, 347 U.S. 483] and others predicated on it, is unconstitutional on its face. Such an artifice is the statute in suit." *Bush v. Orleans Parish School Board*, 163 F.Supp. 701, aff'd, 268 F.2d 78. See also, *Lane v. Wilson*, 307 U.S. 268.

Nevertheless, the Legislature continued to contrive circumventive artifices.

In 1958 a third group of segregation laws was enacted, including Act 256, which empowered the Governor to close any school under court order to desegregate, as well as any other school in the system. In the first court test of this law it was struck down as unconstitutional by this court on August 27, 1960. *Bush v. Orleans Parish School Board*, 187 F.Supp. 42.

On July 15, 1959, the court ordered the New Orleans School Board to present a plan for desegregation, *Bush v. Orleans Parish School Board*, No. 3630, but there was no compliance. Therefore, on May 16, 1960, the court itself formulated a plan and ordered desegregation to begin with the first grade level in the fall of 1960.

For the fourth time, in its 1960 session, the Legislature produced a packet of segregation measures, this time to prevent compliance with the order of May 16, 1960. Four of these 1960 measures—Acts 333, 495, 496 and 542 and the three earlier acts referred to above—Act 555 of 1954, Act 319 of 1956 and Act 256 of 1958—were declared unconstitutional by a three-judge court on August 27, 1960, in the

2. That, accordingly, every citizen of the United States, by virtue of his citizenship, is bound to respect this constitutional right, and that all officers of the State, more especially those who have taken an oath to uphold the Constitution of the United States, including the governor, the members of the State legislature, judges of the State Courts, and members of the local school boards, are under constitutional mandate to take affirmative action to accord the benefit of this right to all those within their jurisdiction. U. S. Const., Art. VI, cl. 2, 3 *Cooper v. Aaron*, 358 U. S. 1.

3. That when, notwithstanding their oath so to do, the officers of the State fail to obey the Constitution's command, it is the duty of the Courts of the United States to secure the enjoyment of this right to all who

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combined cases of *Bush v. Orleans Parish School Board* and *Williams v. Davis*, and their enforcement by "the Honorable Jimmie H. Davis, Governor of the State of Louisiana, and all those persons acting in concert with him, or at his direction, including the defendant, James F. Redmond," was enjoined. *Bush v. Orleans Parish School Board*, 187 F.Supp. 42, 45. At the same time, the effective date of the desegregation order was postponed to November 14, 1960.

Again, at the First Extraordinary Session of 1960, the Louisiana Legislature adopted a series of measures designed to thwart the orders of this court. Even after integration was an accomplished fact, the Legislature sought to defeat it. On November 30, 1960, this court held Acts numbered 2, 10 through 14, and 16 through 23, as well as House Concurrent Resolutions Nos. 10, 17, 19, and 23, unconstitutional. *Bush v. Orleans Parish School Board*, ... F.Supp. .... (Nov. 30, 1960).

Undeterred, in its Second Extraordinary Session for 1960, the Louisiana Legislature passed the measures here under consideration.

At this writing the Legislature has entered into an unprecedented third special session, from which another "segregation package" is presumably to be expected.

are deprived of it by action of the State. *Brown v. Board of Education*, 349 U.S. 294, 299-301.

4. That the enjoyment of this constitutional right cannot be denied or abridged by the state, and that every law or resolution of the legislature, every act of the executive, and every decree of the state courts, which, no matter how innocent on its face, seeks to subvert the enjoyment of this right, whether directly through interposition schemes, or indirectly through measures designed to circumvent the orders of the courts of the United States issued in protection of the right, are unconstitutional and null. *Cooper v. Aaron, supra United States v. Louisiana*, ... U.S. .... (Dec. 12 1960), denying stay in *United States v. Louisiana*, ... F. Supp. ....(Nov. 30, 1960).

All this has been clear since 1954 when the Supreme Court announced its decision in *Brown v. Board of Education*, 347 U.S. 483. Yet, Louisiana's record since that time has been one of stubborn resistance.[2] With singular persistence, at every session since 1954, its Legislature has continued to enact, and re-enact, measures directly intended to deny colored citizens the enjoyment of their constitutional right, the most recent, and the most flagrant being the interposition declaration of the First Extraordinary Session of 1960 which purports to nullify the right itself. In each instance, this court has patiently examined the legislation and explained the reason why it could not stand.

[2] See Note 1.

The segregation packages enacted at the Regular Sessions of 1954, 1956, 1958 and 1960, and at the First Extraordinary Session of 1960, have all been considered in detail.[3] The basis of these rulings is obvious enough. But, when this court, with what no one dare term undue haste, finally set a date for the practical enjoyment of the constitutional right already so long delayed, and invited the School Board of Orleans Parish, where implementation was to begin, to submit a plan of desegration, a new line of attack was initiated. Orleans Parish and its School Board now became the prime target.

The Louisiana Legislature initially enacted measures to deprive the Board of the power to comply with the orders of the court. In consequence, the Orleans School Board offered no suggestions and this court was compelled to devise its own plan of desegregation, admittedly a modest one involving initially only the first grade. On the plea of the Board, the effective date for the partial desegregation of the public schools of New Orleans was delayed two months to November 14, 1960. At length, the Orleans Parish School Board realized its clear duty and announced its proposal to admit five Negro girls of first-grade age to two formerly all-white schools. But for obeying the constitutional mandate and the orders of this court, the Board brought on itself the official wrath of Louisiana. Despite reiterated injunctions expressly prohibiting them from "interfering in any way with the administration

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[3] See Note 1.

of the public schools for Orleans Parish by the Orleans Parish School Board,"[4] the members of the Legislature, already called into special, now apparently continuous, session,[5] took every conceivable step to subvert the announced intention of the local School Board and defy the orders of this court. Acts and resolutions were passed to abolish the Orleans Parish School Board and transfer the administration of the New Orleans schools to the Legislature, and when the enforcement of these measures was restrained, four members of the local Board were attempted to be addressed out of office. As we noted in declaring these acts and resolutions unconstitutional,[6] they were of course part of the general scheme to deny the constitutional rights of the plaintiffs here. But, more than that, there was in this legislation a deliberate defiance of the orders of this court issued in protection of those rights. If for no other reason, the measures were void as illegal attempts to thwart the valid orders of a federal court.

Against this background, it is nevertheless asserted that the present acts and resolutions, Act 2[7] and House

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[4] See, e.g., *Bush v. Orleans Parish School Board*, 187 F.Supp. 42; id., ... F.Supp. .... (Nov. 30, 1960).

[5] At this writing, the legislators are in their third successive special session.

[6] *Bush v. Orleans Parish School Board*, ... F.Supp. .... (Nov. 30, 1960).

[7] At the outset the defendants represented by the Attorney General of Louisiana, citing Title 28, U.S. Code, Section 2284, moved for a stay of these proceedings insofar as they relate to Act 2 of the Second Extraordinary Session of 1960 on the ground that a state court, in litigation challenging the constitutionality thereof, has issued a temporary restraining order against its enforcement. The action in the state court is a taxpayers' suit seeking, not the enforcement of, but an injunction against the enforcement of Act 2. Since 28 U.S.C.

Concurrent Resolutions 2, 23 and 28, are invulnerably insulated from federal judicial review. Yet they are no different in kind, or in purpose, from those just discussed. Again the plain object of the measures is to frustrate the Orleans Parish School Board in its effort to comply with this court's orders,[8] and, again, the effect of the measures is to defy this court's injunction prohibiting interference with the administration of the local schools by its own elected school board.[9] Thus,

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§2284 requires a stay in this court only where the state court action in which the stay has been granted is a suit to enforce the statute rather than to enjoin its enforcement, that section appears inapplicable here.

If this be deemed a too technical reading, of §2284, still that section has no application here because the stay in state court enjoins the enforcement of only one section of the state statute in question, the section which relates to the appointment of a school board with only fiscal functions. It does not in any way enjoin the meat of the statute, the section providing for the control and operation of the Orleans Parish schools by the Louisiana Legislature rather than the Orleans Parish School Board. It is this latter section which is of primary importance here. Since the state court stay is not broad enough to protect the parties here in suit, §2284 has no application. *Dawson v. Kentucky Distilleries Co.*, 255 U.S. 288, 297. Moreover, and perhaps this should have been mentioned first in order of importance, the state court stay, initially granted at the district court level, has now been "hereby dissolved, recalled and set aside" by the Supreme Court of Louisiana. *George L. Singlemann, et al v. Jimmie H. Davis, et al*, La. Sup. Ct., No. 45,447 (Dec. 15, 1960).

[8] The Orleans Parish Board is more than an original defendant in these proceedings. As noted, it is itself under a constitutional duty, and court order, to implement the right in question, and, may assert the right of its wards, the school children of Orleans Parish. Moreover, it has a right to be free from interference in complying with the orders of this court. Unquestionably, this right is a federal right. It will be protected by this court to the full extent of the law. See *Brewer v. Hoxie School District No. 46*, 8 Cir., 238 F.2d 91.

[9] The United States obviously has a vital interest in vindicating the authority of the federal courts. It is therefore appropriate that the Government, as *amicus curiae*, institute proceedings herein to protect the court against illegal interference. *Faubus v. United States*, 8 Cir., 254 F.2d 797, 804-805.

Act 2 of the Second Extraordinary Session of 1960 expressly purports to vest primary control of the New Orleans schools in the Legislature itself under the very acts and resolutions already declared unconstitutional by this court, and for fiscal matters, to create a new board. House Concurrent Resolutions 2, 23 and 28 of the same session attempt to deny the School Board control of its own funds deposited in local banks and warn the banks against honoring the Board's checks. However local in character Act 2 and Resolutions 2, 23 and 28 may appear, since they would discriminate against Negro children through interference with the orders of this court, they are invalid *Gomillion v. Lightfoot*, ... U.S. .... (Nov. 14, 1960); *Cooper v. Aaron*, 358 U.S. 1; *Brown v. Board of Education*, 347 U.S. 483.

Before the court also is the application of the Orleans Parish School Board for a temporary injunction requiring certain banks in the City of New Orleans to honor its checks drawn on its accounts in those banks. Because of the resolutions warning the banks not to recognize the Orleans Parish School Board as such, the banks, pending court direction, have blocked the accounts and refused to honor checks drawn on them by anyone. In addition, the Board asks that the City of New Orleans, as the tax collector for the Board, be directed, by temporary injunction, to remit to the Board the taxes so collected as required by law.

In view of our holding herein that Act 2 and House Concurrent Resolutions 2, 23 and 28 of the Second Ex-

traordinary Session of the Louisiana Legislature of 1960 are invalid, the Orleans Parish School Board, as the duly constituted and elected authority to operate the public schools of New Orleans, is the owner of the bank accounts in question and the proper party to draw checks thereon. By the same holding the City is required to remit to the Board its tax monies.

Finally, the United States, *amicus curiae*, has moved for a temporary restraining order against Act 5 of the Second Extraordinary Session of 1960. This Act would make the Attorney General of Louisiana counsel for the Orleans Parish School Board, replacing counsel named by the Board. The Attorney General argues that certainly the Legislature has the right to name counsel for a state board which it created, certainly this is a local matter unaffected by any federal constitutional considerations.

Unquestionably, the appointment of counsel for the Board is a local matter. If the appointment is not part of the legislative scheme of discrimination, it is insulated from federal judicial review. *Cooper v. Aaron*, *supra*. Let us see then what the purpose of Act 5 is, what its effect would be. *Gomillion v. Lightfoot*, *supra*.

The Orleans Parish School Board is under the injunction of this court to desegregate the public schools in the City of New Orleans. After several years resistance, it is now making a good faith effort to comply. In this effort it is being harassed by the Louisiana Legislature which has been sitting in successive extra-

ordinary sessions solely for this purpose. During these sessions, the Legislature, in its determination to preserve racial segregation in the Orleans Parish Schools, has on four occasions sought to wrest control of the schools from the Board and on one occasion sought to address its majority out of office. The Legislature has also brought financial chaos to the Board through a series of statutes and resolutions denying the Board control of its fisc, one resolution even warning the banks not to honor the Board's checks drawn on its own accounts.

Against this harassment the Board, through its counsel, has sought the protection and the aid of this court in carrying out its orders. In these present proceedings for example, the Board, through its counsel, has sought the aid of the court in unfreezing its bank accounts so that the salary checks of its employees will be honored. The Attorney General, pursuant to Act 5, has sought to replace counsel for the Board, and without consulting his new client, moved to withdraw the Board's motion against the banks. Thus the purpose of Act 5 becomes clear, if indeed there was ever doubt. Its purpose is to require the Board, in its effort to comply with the orders of this court, to use the opposition's lawyer to protect itself from the opposition. Thus Act 5 is exposed as one of the Legislature's less sophisticated attempts to preserve racial discrimination in the public schools of New Orleans.

The temporary injunction will issue as prayed for, as will the temporary restraining order. Decree to be drawn by the court.

(S.) RICHARD T. RIVES,
(Richard T. Rives),
Judge, United States Court of Appeals,
(S.) HERBERT W. CHRISTENBERRY,
(Herbert W. Christenberry),
Chief Judge, United States District Court,
(S.) J. SKELLY WRIGHT,
(J. Skelly Wright),
Judge, United States District Court.

New Orleans, Louisiana,
December 21st, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 812

THE CITY OF NEW ORLEANS,

Appellant,

versus

EARL BENJAMIN BUSH, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

MOTION TO AFFIRM

SAMUEL I. ROSENBERG,
747 National Bk. of Comm. Bldg.,
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Attorney for Orleans Parish School Board; Board Members,
LOUIS G. RECKE,
LLOYD J. RITTINER,
MATTHEW R. SUTHERLAND,
THEODORE H. SHEPARD, JR.,
and; Superintendent of Schools for Orleans Parish,
DR. JAMES F. REDMOND,
Appellees.

HAUSER PRINTING CO., INC., NEW ORLEANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 812

THE CITY OF NEW ORLEANS,

Appellant,

versus

EARL BENJAMIN BUSH, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

MOTION TO AFFIRM

Appellees move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

OPINION BELOW

This is an Appeal from the opinion filed December 21, 1960 by the United States District Court for the Eastern District of Louisiana, New Orleans, Division, sitting as a statutory three Judge Court. The opinion and the temporary injunction, which was issued on the same date, are printed in the Jurisdictional Statement filed herein by Appellants (Appendix A, pp. 12-26).

REASONS FOR GRANTING THE MOTION

The instant appeal is an appeal from the same opinion of the District Court, from which an appeal was taken by the Legislature of Louisiana in the matter styled, *The Legislature of Louisiana, et als. vs. Earl Benjamin Bush, et als.*, No. 706, October Term, 1960. In a *per curiam* decided March 20, 1961, this Court granted a Motion to Affirm filed therein by Earl Benjamin Bush, et al., Appellees. *Orleans Parish School Board et al.*, and the *Legislature of Louisiana, et al., vs. Earl Benjamin Bush, et al.*, Nos. 589, 613 and 706, October Term, 1960.

In the same *per curiam*, the judgment here being appealed from was affirmed.

Since, in the appeal perfected by the Legislature of Louisiana (No. 706, October Term, 1960), the Court has already affirmed the judgment herein appealed from, it is manifest that the questions on which the decision of this appeal depend are so unsubstantial as not to need further argument and this motion to affirm should be granted.

Respectfully Submitted,

SAMUEL I. ROSENBERG,
747 National Bk. of Comm. Bldg.,
New Orleans, Louisiana,
Attorney for Orleans Parish School Board; Board Members,
LOUIS G. RIECKE,
LLOYD J. RITTINER,
MATTHEW R. SUTHERLAND,
THEODORE H. SHEPARD, JR.,
and; Superintendent of Schools for Orleans Parish,
DR. JAMES F. REDMOND,
Appellees.

PROOF OF SERVICE

I, Samuel I. Rosenberg, Attorney for the Orleans Parish School Board; Board Members: Louis G. Riecke, Lloyd J. Rittiner, Matthew R. Sutherland and Theodore H. Shepard, Jr., and Superintendent of Schools for the Parish of Orleans, Dr. James F. Redmond, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of April, 1961, I served copies of the foregoing Motion to Affirm on the several parties hereto as follows:

On Earl Benjamin Bush, et al., by mailing a copy in a duly addressed envelope with first class postage prepaid to A. P. Tureaud, Esquire, 1821 Orleans Avenue, New Orleans 16, La.

On Jack P. F. Gremillion, A. P. Tugwell, Shelby M. Jackson, Members of the State Board of Education and Roy M. Theriot, by mailing a copy in a duly addressed envelope with first class postage prepaid to Jack P. F. Gremillion, Esquire, Attorney General, State Capitol, Baton Rouge, Louisiana.

On Whitney National Bank in New Orleans, by mailing a copy in a duly addressed envelope with first class postage prepaid to J. Raburn Monroe, Esquire, Whitney Bank Building, New Orleans, Louisiana.

On Hibernia National Bank of New Orleans, by mailing a copy in a duly addressed envelope with first class postage prepaid to Louis B. Claverie, Esquire, Hibernia Bank Building, New Orleans, Louisiana.

On National American Bank of New Orleans, by mailing a copy in a duly addressed envelope with first class postage prepaid to Clem H. Sehrt, Esquire, Pere Marquette Building, New Orleans, Louisiana.

On National Bank of Commerce in New Orleans, by mailing a copy in a duly addressed envelope with first class postage prepaid to George Denegre, Esquire, National Bank of Commerce Building, New Orleans, La.

On City of New Orleans, by mailing a copy in a duly addressed envelope with first class postage prepaid to Alvin J. Liska, Esquire, City Attorney, City Hall, New Orleans, Louisiana.

On the Legislature of Louisiana and Edward Lebreton, et als., by mailing a copy in a duly addressed envelope with first class postage prepaid to W. Scott Wilkinson, Esquire, P. O. Box 1707, Shreveport, Louisiana.

On the United States of America, by mailing a copy in a duly addressed envelope with first class postage prepaid to M. Hepburn Many, Esquire, United States Attorney, Federal Building, New Orleans, La., and with Air Mail Postage Prepaid to the Solicitor General, Department of Justice, Washington, D. C.

Samuel I. Rosenberg

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